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DEC 10

CHARLES

Supreme Court of the United States

OCTOBER TERM, 1934.

No. 383

G. D. SWINSON,

Petitioner,

vs.

CHICAGO, ST. PAUL, MINNEAPOLIS & OMAHA RAILWAY COMPANY,

Respondent.

RESPONDENT'S BRIEF.

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RESPONDENT'S BRIEF.

OPINION DELIVERED IN COURT BELOW.

G. D. Swinson v. Chicago, St. Paul, Minneapolis & Omaha Railway Company, 72 Federal (2d) 649 (C. C. A. 8).

FOREWORD.

Petitioner's brief does not contain a statement of the case and his summary of facts, so-called, on Pages 3 and 4 of his Petition is inconclusive and inaccurate. Respondent will make a concise statement of the case.

STATEMENT OF THE CASE.

Case.

Petitioner brought this action in the U. S. District Court, District of Minnesota, Fourth Division, under the Federal Employers' Liability Act (Act of Apr. 22, 1908, C. 149, 35 Stat. 65, 45 U. S. C. A. Sec. 51), to recover for personal injuries resulting from respondent's alleged violation of the Safety Appliance Acts relating to handholds (Act of Mar. 2, 1893, C. 196, Sec. 4, 27 Stat. 531, 45 U. S. C. A. Sec. 4), and running boards (Act of Apr. 14, 1910, C. 160, Sec. 2, 36 Stat. 298, 45 U. S. C. A. Sec. 11). Respondent denied liability. At the close of the evidence the trial court directed a verdict for respondent (R. 76), upon which judgment was entered (R. 101), and the Circuit Court of Appeals for the Eighth Circuit on Aug. 2, 1934, affirmed this judgment (R. 115).

Facts.

Petitioner, a railway freight brakeman, was injured at Mitchell, S. D., Sept. 17, 1932, while releasing the hand brake at the west end of an oil tank car (Ex. 8, 9, R. 80, 81) moving slowly westward, when he applied foot pressure to the horizontal end handhold affixed at the north side of the west end of the end running board, causing the north end of this handhold to pull thru and split the running board (R. 6, 7, 8). Exhibits 8 and 9 are photographs of the west end of the car and Exhibit 8 shows the running board and handhold immediately after the accident (R. 80, 81).

The hand brake was tightly set and to release it required the application of considerable force to the brake wheel. To exert such force petitioner placed his left foot on the surface of the

running board back of and adjacent to the brake pawl, and his right foot down on this handhold. As he pulled on the brake wheel and exerted foot pressure downward and outward on the handhold, its north end pulled through and split the running board, overbalancing petitioner and causing him to fall to his injury in front of the moving car (R. 6 to 12, incl.).

A booklet containing the Interstate Commerce Commission's Safety Appliance Standards Order of March 13, 1911, was received in evidence as Exhibit 12 (R. 25), but is not included in the printed record. For convenience the exact copy of this order appearing in Roberts Federal Liabilities of Carriers (2nd Ed.), Vol. 2, Appendix Q., p. 2010-2038, inclusive, will be referred to herein. The safety appliance requirements respecting tank cars of the type here involved appear under the heading "Tank Cars without End Sills", beginning on Page 2026.

This tank car had end and side running boards that extended around the car. The running board at the west end was 11 in. wide (E to W), 9 ft. long (N. to S.) and the handhold was 18 in. wide. At each end it was bolted to the under side of the board, extended horizontally outward 2¾ in. from the west edge of the running board and was 1¾ in., or the thickness of the board, below the surface thereof. The hand brake staff was in the middle (E to W) of the end running board and 34 in. from the board's north edge (R. 20, 21, 24-25).

The order required this end running board to have a minimum width of 6 in. and permitted the end handholds to be affixed to the end of the end running board extending either horizontally outward or vertically downward (Roberts, p. 2027-8). On 90% of the tank cars in use at the time the handholds at the end of the end running boards extended downward either out from the running board, as shown on Ex. 14 and 15 (R. 86-87), or back under the running board, as

shown on Ex. 13, 16, 19, 21 and 24 (R. 85-88-90-92-95), or had some obstacle between the handhold and the brake, as shown on Ex. 13, 14, 15, 20, 22, 24, 25 (R. 85, 86, 87, 91-93, 95-96), making it impossible to reach with the foot while standing on the running board at the brake (R. 39). Each tank car of the type involved has a similar handhold affixed to the end running board in the same manner at each side of each end of the car (R. 26).

At the risk of repetition, but to remove the erroneous impression created by petitioner's brief as to the cause of injury, it is necessary to emphasize that this end handhold was no part of any ladder or step leading from near the ground to the end running board and petitioner when injured was utilizing the end handhold solely as a foot brace upon which to exert foot pressure to secure leverage in releasing the hand brake and not as a ladder rung or step to stand on in riding or climbing on the car.

SUMMARY OF ARGUMENT.

1. Federal Employers' Liability Act applies, and thereunder substantial evidence of actionable negligence, (breach of duty + proximate cause) necessary to recovery.

2. Safety Appliance Acts relating to handholds impose no duty to maintain secure end handhold for use as foot brace to withstand foot pressure in releasing hand-brake.

3. While so misusing the end handhold petitioner not one entitled to protection of handhold statute, and violation thereof resulting from such misuse not legal proximate cause of his injury.

4. Because petitioner's injury resulted from such misuse of end handhold he cannot recover.

5. Violation of Safety Appliance Acts relating to running boards, not involved.

6. To permit recovery for injury resulting from misuse of end handhold will pervert Congressional intent with respect to all Safety Appliance legislation.

ARGUMENT.

NO SUBSTANTIAL EVIDENCE OF ACTIONABLE NEGLIGENCE.

I. Right of Recovery Governed Exclusively by Provisions of Federal Employers' Liability Act.

Petitioner was injured while working as a brakeman in respondent's employ when both were engaged in interstate commerce. Therefore, his right of recovery, if any, is confined exclusively to, and governed by the provisions of the Federal Employers' Liability Act (Act of Apr. 22, 1908, C. 149, Sec. 1, 35 Stat. 65, 45 U. S. C. A., Sec. 51), even though the negligence claimed is an alleged violation of a Federal Safety Appliance Statute.

Wabash R. R. v. Hayes, 234 U. S. 86.

San Antonio Ry. v. Wagner, 241 U. S. 476.

II. Under Federal Employers' Liability Act Substantial Evidence of Actionable Negligence Necessary to Recovery.

So far as relevant, this Act provides:

> "Every common carrier by railroad while engaging in commerce between any of the several states * * * shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce * * * resulting * * * by reason of any defect or insufficiency due to its negligence in its cars (or) appliances * * *." (Act of Apr. 22, 1908, C. 149, Sec. 1, 35 Stat. 65, 45 U. S. C. A., Sec. 51).

Thereunder, as construed and applied by this court, petitioner may not recover for injuries resulting from any defect or insufficiency in respondent's cars or appliances unless he first establishes by substantial evidence that the defect or insufficiency was due to respondent's negligence and that the injury was proximately caused by such negligence. Stated differently, to recover he must establish by substantial evidence that respondent was guilty of actionable negligence.

Seaboard Air Line v. Horton, 233 U. S. 492.

This is true even when an alleged violation of a Safety Appliance Statute is involved.

San Antonio Ry. v. Wagner, 241 U. S. 476.

III. No Actionable Negligence, Unless Breach of Duty Owed Petitioner, Proximate Cause of Injury.

It is elementary that if respondent violated no duty owed petitioner, it was not guilty of negligence even though its performance of a duty owed another would have prevented injury to petitioner.

Chesapeake & Ohio Ry. Co. v. Nixon, 271 U. S. 218.

Chesapeake & Ohio Ry. Co. v. Mihas, 280 U. S. 102.

Western Union Teleg. Co. v. Schriber, 141 Fed. 538 (C. C. A. 8).

Duree v. Wabash R. Co., 241 Fed. 454 (C. C. A. 8).

Palsgraf v. Long Island R. Co., 248 N. Y. 339, 162 N. E. 99.

This is true even when the duty is one imposed by a safety appliance or other statute. The Safety Appliance Acts merely substitute for the master's common law to use ordinary care to furnish a servant with reasonably safe appliances, the absolute statutory duty to maintain such appliances, but do not change the rule that such duty is owing only to one for whose

protection it is imposed. The violation of the statute is negligence per se only to one to whom the statutory duty is owing.

St. L. & San Fran. R. R. v. Conarty, 238 U. S. 243;

Lang v. N. Y. Cent. R. R. Co., 255 U. S. 455;

Chicago G. W. Ry. Co. v. Minneapolis, St. P. & S. S. M. Ry. Co., 176 Fed. 237 (C. C. A. 8);

O'Donnell v. Providence & Worchester R. R. Co., 6 R. I. 211;

San Antonio Ry. v. Wagner, 241 U. S. 476.

Negligence plus proximate cause is actionable negligence. If respondent violated no duty owed petitioner it was not guilty of actionable negligence, because, (a) there would be no negligence; (b) proximate cause is always ~~anterior~~ posterior to negligence; and (c) the violation of a statute arising from the breach of a duty thereunder owed another would not be the proximate cause of petitioner's injuries.

Chesapeake & Ohio Ry. Co. v. Nixon, 271 U. S. 218;

Chesapeake & Ohio Ry. Co. v. Mihas, 280 U. S. 102;

Palsgraf v. Long Island R. Co., 248 N. Y. 339, 162 N. E. 99;

St. L. & San Fran. R. R. v. Conarty, 238 U. S. 243;

Lang v. N. Y. Cent. R. R. Co., 255 U. S. 455.

IV. Unless Handhold Statute Imposed Duty to Furnish Secure End Handhold For Use as Foot Brace, Petitioner's Injury Not Within Evil Against Which Its Provisions Directed, He Was Not Within Class Entitled to Protection Thereunder and Under Circumstances Violation of Statute Due to Insecurity of Handhold Not Proximate Cause of His Injury.

The employer's duty in furnishing an instrumentality to a servant is restricted to seeing that it is reasonably safe for the

performance of the function for which it is furnished, designed and intended to be used. The failure of an instrumentality to function when a servant devotes it to a use for which it is not furnished, designed and intended is not evidence of a breach of any duty owed that servant.

Louisville & N. R. Co. v. Parsons, 213 Ky. 432, 281 S. W. 519.

Campbell v. Southern Pac. R. Co., 120 Ore. 122, 250 Pac. 622.

Southern Ry. Co. v. Chestnut, 210 Ala. 282, 97 So. 905.

McClain v. Seaboard Air Line Ry., 34 Ga. App. 86, 129 S. E. 876.

Labatt, Master and Servant, 2nd Ed., Sec. 921.

Hahn v. C. M. & St. P. Ry. Co., 157 Minn. 354, 196 N. W. 257.

Morrison v. Burgess Sul. Fib. Co., 70 N. H. 406, 47 Atl. 412, 85 Am. State Reports 634.

C. R. I. & P. Ry. Co. v. Murray, 85 Ark. 600, 109 S. W. 549, 16 L. R. A. (N. S.) 984 and cases discussed in annotation following.

This is true even when the instrumentality is required to be furnished by a Safety Appliance Statute.

St. L. & San Fran. R. R. v. Conarty, 238 U. S. 243.

Lang v. N. Y. Cent. R. R. Co., 255 U. S. 455.

Therefore, unless the handhold statute imposed on respondent a duty to maintain this end handhold secure for use as a foot brace in the manner it was used, by failing to maintain it secure for such use respondent violated no statutory duty owed petitioner.

Because respondent's failure to maintain it secure may have breached a statutory duty owed one using it as a handhold or

that the performance of the duty owed such person would have prevented injury to petitioner, does not entitle him to recover.

St. L. & San Fran. R. R. v. Conarty, 238 U. S. 243.

Lang v. N. Y. Cent. R. R. Co., 255 U. S. 455.

Chesapeake & Ohio Ry. Co. v. Nixon, 271 U. S. 218.

Chesapeake & Ohio Ry. Co. v. Mihas, 280 U. S. 102.

Chicago G. W. R. R. Co. v. Minneapolis, St. P. & S. S. M. Ry. Co., 176 Fed. 237, (C. C. A. 8).

W. A. Hover & Co. v. D. & R. G. W. R. Co., 17 Fed. (2d) 881 (C. C. A. 8).

If, by the handhold statute, Congress did not intend or require a secure end handhold for use as a foot brace or support to provide leverage in releasing a hand brake, then when petitioner so applied it he used it for a purpose for which it was not intended or required by Congress. In that situation he was not one for whose protection the statute was enacted and the giving way of the handhold under those circumstances did not constitute a breach of any statutory duty imposed for his benefit.

St. L. & San Fran. R. R. v. Conarty, 238 U. S. 243.

Lang v. N. Y. Cent. R. R. Co., 255 U. S. 455.

Likewise, if while so misusing the handhold, petitioner was not within the class entitled to the statutory protection, then the violation of the statute due to the insecurity of the handhold cannot be considered the proximate cause of petitioner's injury. If respondent owed no statutory duty to furnish petitioner either a secure handhold or any handhold at all to use as a foot brace for leverage in releasing the hand brake then his injury was not the natural, probable and foreseeable consequence of respondent's failure to comply with the handhold statute.

Was the provision requiring secure end handholds designed to remedy any evil arising out of the absence of an appliance to provide foot leverage or support to a man releasing a brake? If not, then petitioner's injury was not within the evil against which that provision of the statute was directed and he was not one for whom the act was intended to furnish protection.

St. L. & San Fran. R. R. v. Conarty, 238 U. S. 243.

Lang v. N. Y. Cent. R. R. Co., 255 U. S. 455.

At the risk of overemphasis, we repeat that it is only where a statute imposes a specific duty for the protection and benefit of a person and the breach of such duty results in injury to him of the character which the statute was designed to prevent, that liability follows. Unless petitioner when injured was using this end handhold for a purpose within the Congressional intent and, therefore, was one for whose protection it was required, the mere pulling out of the handhold under the circumstances would not constitute negligence per se as to him nor would the violation of the statute resulting from the handhold's insecurity under those circumstances be the legal proximate cause of his injury.

For what purpose, and for the protection of what employes, in what situations did Congress require this end handhold to be secure?

V. Purpose and Intent of Congress in Requiring Secure End Handholds.

(a) *As evidenced by known and ordinary significance of language of handhold statute.*

So far as relevant this Act provides: "It shall be unlawful to use any car * * * not provided with secure handholds or grabirons in the ends * * * of each car for greater se-

curity to men in coupling and uncoupling cars". (Act of Mar. 2, 1893, C. 196, Sec. 4, 27 Stat. 531, 45 U. S. C. A. Sec. 4).

A question of statutory construction is involved.

Fairport P. & E. R. Co. v. Meredith, 292 U. S. 589, 594.

> "The popular and received import of words furnishes the general rule for the interpretation of public laws * * * and where the legislature adopts such language in order to define and promulge their actions or their will, the just conclusion from such a course must be that they not only themselves comprehended the meaning of the language they had selected, but had chosen it with reference to the known apprehension of those to whom the legislative language is addressed and for whom it is designed to constitute a rule of conduct * * *."
>
> *Maillard v. Lawrence*, 57 U. S. 250, 261, 16 How. 251, 261.

We must conclude Congress used the words "handholds" or "grabirons", in their known and ordinary significance at that time.

Maillard v. Lawrence, supra.

Old Colony R. Co. v. Comm. of Internal Revenue, 284 U. S. 552.

What was the known and ordinary significance of these words on Mar. 2, 1893? Without extrinsic evidence or the aid of a dictionary then current, the meaning of the words "handholds" or "grabirons" is clear and understandable to the ordinary person. A handhold is, as its name implies, a device to be grasped by the hand, a grabiron, as its name implies, is one to be grabbed by the hand. That this was their known and ordinary significance when Congress used them in the Act is confirmed by the definitions lexicographers attached to them.

Handhold: "To hold or grasp with the hand."

The Century Dictionary (1889).

Handhold: "1, hold for the hand, grip with the hand; 2, that portion of any implement that is grasped by the hand.

Grabiron: "the name of an appliance for seizing or clutching".

Oxford English Dictionary (1888).

Handhold: "1, a hold or grip with the hands; something for the hand to hold on to; 2, the part of an implement that is especially fashioned to be held in the hand."

Webster's Unabridged Dictionary, 1890.

Congress intended to use these words in their known and ordinary significance. Had it intended that the appliance which it designated as a handhold was to be used primarily or incidentally as a foot brace or support to secure leverage in releasing a handbrake, we must assume it would have used descriptive words of known and ordinary significance to indicate that intent, or it would have used words of known and ordinary significance to clearly describe and designate an appliance intended, and safe and adequate for that use.

The language of the Act indicates that the primary evil Congress intended to remedy by requiring secure end handholds was that arising from the hazards and dangers to trainmen when required to be between the ends of cars due to the prevalance of link and pin couplers and the absence of automatic couplers. Therefore, we must assume it intended to require an appliance which, while trainmen were between cars, would give them greater security than would be the case in the absence of end handholds.

With that in mind, can it reasonably be contended that Congress would designate an appliance as a handhold, permit it to be located at any place on the end of a car and at the same time intend it for use as a foot brace or support to secure leverage

in releasing a hand brake, without also standardizing the location of the brake in relation to the handhold so that the end handhold would be available for such use on every car or without requiring a form of handhold that would permit its safe use at all times as a foot brace?

Efficient handbrakes were not required by federal statute until April 14, 1910 (Act of Apr. 14, 1910, C. 160, Sec. 2, 3, 36 Stat. 298, 45 U. S. C. A. Sec. 11), and their location was not standardized until March 11, 1911 (Commission's Safety Appliance Standards Order of Mar. 11, 1911). Therefore, in 1893 there was no standard location for either hand brakes or end handholds; the latter being back under the running board inaccessible for use as a foot brace in releasing the handbrake (Interstate Commerce Commission Annual Report, 1895, P. 266 and cuts following), and the handbrake might then be located either to the right or left of the drawbar.

The failure of Congress to then provide a uniform relative location for end handholds and handbrakes further indicates its intent to use the words "handholds" or "grabirons" in their known and ordinary sense: Appliances to grasp, hold, seize or clutch with the hands. To conclude otherwise would require an assumption that Congress intended to attach to these words an unknown and extraordinary significance. This we may not do.

Congress desired greater security for trainmen. In the release of handbrakes it could attain that result most effectively, (as it later did), by requiring secure running boards rather than handholds or grabirons, the use of which for foot braces or supports would result in greater insecurity to trainmen and thereby defeat the purpose of the handhold statute.

If Congress did not feel that running boards were adequate, safe and intended to stand on and secure whatever leverage

was necessary while releasing a handbrake, why did it not in the 1910 Act require an additional appliance for that purpose and designate it by a name which would indicate it was intended for that use?

That by the Act of Mar. 2, 1893, Congress intended to require appliances to grasp and use with the hands is apparent, because it did not at that time attempt to prescribe or require the safety appliances intended to be used to climb, step and walk on. Not until the passage of the Act of Apr. 14, 1910, did it specifically designate and require appliances to climb, step, walk and stand on and then it designated them by names (sill steps, ladders and running boards), which indicated to the ordinary mind that they were intended for such use.

Had Congress felt that the appliances it designated as handholds and grabirons were intended for use as foot braces or supports, or to climb, step, walk and stand on, it would have been unnecessary in the 1910 Act to designate for that use additional appliances, such as sill steps and ladders, by names which clearly indicated they were intended for that purpose. Instead, it could merely have required handholds or grabirons at the locations where sill steps and ladder rungs were thereunder required.

In the 1910 Act Congress required that all cars having ladders be equipped with secure handholds or grabirons on their roofs at the tops of such ladders, thereby indicating that in the Congressional mind there was a clear distinction between the terms "handholds" and "ladders", and of the intended use of each.

If the word "handholds" or "grabirons" is given its ordinary and known meaning, it logically follows that when Congress used these words in the handhold statute it intended to designate an appliance for trainmen to grasp with their hands for

their greater security and not one for use as a foot brace or support for their greater insecurity while releasing a handbrake.

How the word "handhold" was understood by one court prior to the passage of the handhold statute is indicated by the following:

> "A railroad is bound to furnish and keep in repair proper handholds on the ends of its box cars for the use of brakemen, and it is negligence on the part of the company to send out a car, the handhold on which is so bent that it can only be grasped at the ends." *Settle v. St. L. & San F. R. R. Co.*, 127 Mo. 336, 30 S. W. 125.

(b) *As understood by administrative body charged with duty to standardize location, etc. of all safety appliances.*

To make uniform the number, location and dimensions, and manner of application of handholds, sill steps, running boards, ladders and handbrakes, Congress enacted the Act of April 14, 1910 (Act of April 14, 1910, C. 160, Sec. 3, 36 Stat. 298, 45 U. S. C. A., Sec. 12), which, so far as relevant, reads:

> "Sec. 3. * * * the Interstate Commerce Commission, after hearing, shall designate the number, dimensions, location and manner of application of the appliances provided for by section two of this Act and section four of the Act of March second eighteen hundred and ninety-three, and thereafter said number, location, dimensions and manner of application as designated by said Commission shall remain as the standard of equipment to be used on all cars * * * and failure to comply with any such requirement of the * * * Commission shall be subject to a like penalty as failure to comply with the requirements of this Act."

Under Section 3 Congress intended to standardize the character and location of handholds so that they would be placed

as nearly as possible at a corresponding location on every car, thereby preventing the betrayal of an employe to his injury when he instinctively reached for the only protection available to him when the necessity therefor arose. To effect the uniformity desired in the interests of safety, Congress delegated to the Interstate Commerce Commission (an administrative body experienced in railroad operation and solicitous for the safety of railroad employes), the task of designating such location and construction. *Illinois Central R. R. Co. v. Williams*, 242 U. S. 462; *Davis v. Maury*, 266 U. S. 401.

After hearing, investigation and seeking the views of railroad employes and managements, the Commission entered its Safety Appliance Standards Order of Mar. 13, 1911 (Robert's F. L. C. 2nd ed., Vol. 2, Appendix Q, p. 2010), wherein it prescribed the number, dimensions, location and manner of application of said appliances. The standards so set provide the rule for the carrier's duty with respect thereto. Because of the Commission's statutory duty to standardize the location, etc. of these safety appliances to afford greater security to men working on or about cars, we must assume it performed such duty.

In specifying the appliances required by the Act of Mar. 2, 1893, the Commission designated them as handholds and provided for their location so as to be readily accessible for a man to grasp while upon or between cars. It is unnecessary to repeat that when it used the word "handhold" in this order it intended to attach thereto the ordinary and usual meaning of that term, that is, an appliance to be grasped with the hand. That such was its intention is evidenced by the fact that it designated the safety appliances commonly used to climb, walk and step on as sill steps, ladders and running boards, indicat-

ing by the names it attached to them that they were to be used to climb, stand and walk on.

In connection with tank cars of the kind with which we are here concerned, it provided (1), that the end running board thereon should have a minimum width of 6 inches; (2) that one end handhold be located near each side on each end of the car on the running board not more than 2 inches back from the edge of the running board projecting downward or outward; and (3) that the brake be located on the end of the car to the left of the center. (Robert's F. L. C. (2nd Ed.) Vol. 2, App. Q, p. 2026, 2027, 2028). Its conclusion with respect to the necessary width of a running board was reached after full consideration of the purposes of a running board and we must assume that the Commission knew that running boards would be used by, and were intended for, men to stand on while setting and releasing brakes. To be consistent we must further assume that when it specified such minimum width it was its deliberate judgment that such width would be sufficient for that purpose. Otherwise it would have provided for a wider running board, as it had the power to do.

If the Commission had intended the appliance it designated as an end handhold to be used as a foot brace or support manifestly it would not have permitted it to be affixed projecting downward and to set back from the edge of the running board as much as 2 inches, because by so doing it precluded its use for that purpose. Likewise, if it had intended that this handhold be used as a foot brace or support in connection with the operation of a brake it would have related the standard location of the brake to the handhold so that the latter could be used for that purpose at all times. This it did not do. Under the order the brake may be located so far to the left of the middle and the handhold so far to the right of the north or left-

hand end of the end running board as to preclude the handhold's use for a foot brace or support in releasing the brake, even when the handhold extends outward horizontally, as did this end handhold. Another indication that the Commission intended that brakes be released by men standing on the running board and that the end handhold was not required as a foot brace.

The Commission also specifies a brake platform at the end of a box car. The area of this platform, as prescribed by the order, is much smaller than the running board here and there is no handhold available for use in releasing the brake while standing on this platform (Ex. 27, R. 97).

On a tank car the brake may be attached to the tank. In such case neither the handhold in question, nor any other handhold, is available for use as a foot brace or support in releasing the brake (Ex. 16, R. 88). The order requires a handhold on each side of each end of the car attached to the running board, extending either downward or outward. Manifestly, the Commission in prescribing this location intended each of these handholds to be used for the same purpose. Assuming these handholds to extend horizontally outward from the end of the running boards, the end handhold on the south side of this car could not be reached by a man while standing on the running board releasing a brake, and of course, those on the other end where a brake is not located could not be used for the purpose of a brace or support in releasing a brake.

If the Commission had intended that the device it designated as a handhold was necessary for, or would be used as a foot brace or support, it easily could have designated it by a name such as a brake step or stirrup to so indicate. It also was interested in safety and must have recognized the fact that the appliance named as a handhold could not be safely used as a

foot brace or support because, (1) it was a narrow rounded piece of iron five-eighths inch in diameter, 1¾ inches below the surface of the running board and would not provide safe or proper support for the feet; (2) if wet, slippery or worn, it might safely be used as a handhold but not as a foot brace or support, and (3) if necessary as a foot brace or support it should be in the same location on all cars, otherwise its absence would be more dangerous than its presence in an insecure condition. It will be seen that if the word "handholds" as used in this order is given its known, usual and ordinary meaning, it logically follows that the Commission standardized the location of this appliance so it could be used to grab hold or grasp with the hand and not as a foothold or brace, and that the Commission's understanding corresponds with the Congressional intent as evidenced by the language of the Act.

(c) *Legislative history of handhold statute confirms intent of Congress that language of Act be given known and ordinary significance.*

The reasons for, and the significant circumstances leading up to the enactment of a statute may be noticed in confirmation of the meaning conveyed by the words used therein. *Johnson v. Southern Pacific,* 196 U. S. 1; *United States v. Missouri Pacific R. Co.,* 278 U. S. 269-278-279.

The annual reports of the Interstate Commerce Commission to Congress are required by the Act of Feb. 4, 1887, C. 104, Sec. 21, 24 Stat. 387, as amended by Act of Mar. 2, 1889, C. 382, Sec. 8, 25 Stat. 862 (49 U. S. C. A. Sec. 21).

The first official recommendations for Federal legislation respecting safety appliances are contained in the annual reports of the Commission for 1889, 1890, 1891 and 1892, and relate exclusively to the necessity for automatic couplers and

continuous train air brakes. The attention of Congress was directed to: (1) the injuries to, and death of trainmen due to the old type of link and pin coupler then in use, necessitating men going between the ends of cars to couple and uncouple cars; (2) the necessity for uniform couplers that would couple automatically, uncouple and stay coupled without the necessity for men going between the ends of cars; (3) the exclusive use of handbrakes to stop and control the speed of freight trains, necessitating men being on top of rapidly moving cars; (4) the necessity for continuous train air brakes to be operated by the locomotive engineer, thereby eliminating the necessity for men being on top of rapidly moving cars. Prior to Mar. 2, 1893, the Commission made no mention of, nor did it recommend legislation requiring handholds or grabirons at the ends and sides of cars (Annual Reports of Interstate Commerce Commission to Congress for years 1889, 1890, 1891 and 1892).

At the first session of the Fifty-second Congress five bills relating exclusively to automatic couplers and continuous train air brakes were introduced in the Senate and referred to its committee on Interstate and Foreign Commerce: S. 811 (Cong. Rec. Vol. 23, Part 1, Page 44); S. 893 (C. R., V. 23, Pt. 1, p. 63); S. 1618 (C. R., V. 23, Pt. 1, p. 311); S. 2574 (C. R., V. 23, Pt. 3, p. 2037), and S. 2951 (C. R., V. 23, Pt. 4, p. 3436, Pt. 5, p. 4846), and at the same session ten similar bills were introduced in the House and referred to its committee on Interstate and Foreign Commerce: H. R. 117 (C. R., V. 23, Pt. 1, p. 128); H. R. 180 (C. R., V. 23, Pt. 1, p. 130); H. R. 211 (C. R., V. 23, Pt. 1, p. 131); H. R. 441 (C. R., V. 23, Pt. 1, p. 199); H. R. 582 (C. R., V. 23, Pt. 1, p. 204); H. R. 611 (C. R., V. 23, Pt. 1, p. 205); H. R. 5134 (C. R., V. 23, Pt. 1, p. 731); H. R. 6187 (C. R., V. 23, Pt. 2, p. 1308); H. R. 6648 (C. R., V. 23, Pt. 2, p. 1578) and H. R. 7512 (C. R., V. 23, Pt. 3, p. 2484).

On February 18, 1892, a hearing on the House bills was held before the House Committee on Interstate and Foreign Commerce, where the first official mention was made of the necessity for Federal legislation requiring handholds at the ends and sides of each car. The purpose for which it was claimed they were required is shown by the following testimony and statements at this hearing, which include every mention made at the hearing with respect to handholds or grabirons. (Page references are to pages of transcript referred to at end of quotation.)

"Rep. O'Neil (Chairman of Committee). I am under the impression that three-fourths of the lives lost and injuries sustained are caused by the absence of safety rails on the tops of cars and safety rails at the ends of cars. I believe that two-thirds of those men were injured because they have nothing on earth to catch hold of when they slip or the train moves. If there was a rail along the side of the car and at each end of the car, so that a man would have a chance to catch hold of it, there would not be anything like so many accidents. If there was a rail on the top of the car, so that when a man slips from the slanting footboard, he would have something to catch himself—A Member: I do not see just what that has to do with the question of couplers. Mr. O'Neil: It has this to do with couplers. When you are dealing with the question of couplers it is a mere matter of an invention to save human life, and if that can be accomplished by rails on the tops and sides of cars it is a matter to be considered in that connection. (p. 6, 7) * * * Mr. O'Neil: Now, speaking about different couplers, all are liable to get out of order, and then you have got to come back to the link and pin. I have talked with railroad men in my section, and they attach a good deal of importance of the question of having something to catch hold of. Sometimes there is a ladder on one end. But generally when they go in between the cars to couple and they slip or the train starts they

have nothing in the world to catch hold of. Mr. Downey: (representing the Switchmen's Mutual Aid Association of North America). He simply has the side of the car to catch hold of. Mr. O'Neil: Do you not think that if there was a rail along the side of the car it would save a great many lives? Mr. Downey: Yes, sir. (P. 13, 14) * * *

"Mr. Moseley: (Secretary of Interstate Commerce Commission) * * * There is just one other matter of which I wish to speak. It was called to our attention the other day by Mr. O'Neil of Missouri, that is the matter of grab-iron handles or something of that sort. Members of the Master Car Builders' Association have, I understand, recommended at their meetings that freight cars should have a handhold, or something that the switchman can take hold of if he slips when between the cars, instead of trying to clutch hold of the side of a perhaps icy car.

"This, I believe, is a most important matter, now that the car coupler is in a transition state and the men are being constantly called upon to couple different types of couplers together, necessitating their going between the cars more than ever, and vastly increasing the risk, the very thing which all of the representatives of the men who have been before you complain of. Until uniformity is brought about, until every car in the country is equipped with a coupler that interchanges perfectly and automatically with every other coupler in use the increased risk continues." (P. 54).

(Transcript of hearing before Committee on Interstate and Foreign Commerce of House of Representatives relating to bill for protection of trainmen providing for the adoption and use of a uniform standard automatic car coupler and continuous brakes, Government Printing Office, 1892).

On June 27, 1892, the committee, through its chairman, Representative O'Neil, reported, in lieu of H. R. 7512, 6648, 6187, 582, 117, 180 and S. 2951, a bill (H. R. 9350) recommending

passage (C. R., V. 23, Pt. 6, p. 5519). On July 8, 1892, under a suspension of the rules, H. R. 9350, as reported by the committee, was passed by the House and the bill and committee report (House Report 1678) were incorporated in the Congressional Record (C. R., V. 23, Pt. 6, pp. 5925, 5926, 5927). In this report the sole reference to handholds is:

> "5. Handholds.—Until the changes contemplated by this bill can be effected, and with a view to minimize the dangers by every means possible, we recommend a requirement of hand grabs or hand irons on all cars, something that the switchman or brakeman can seize to if he slips instead of trying to clutch the side of a wet or perhaps icy car". (C. R., V. 23, Pt. 6, p. 5926 bottom, 5927 top).

In H. R. 9350 as passed by the House, the section relating to handholds read as follows:

> "Sec. 9. That from and after the first of July, 1893, until otherwise ordered by the Interstate Commerce Commission, it shall be unlawful for any railroad company to use any car in interstate commerce that is not provided with secure handholds in the ends and sides of each car." (C. R., V. 23, Pt. 6, p. 5925).

H. R. 9350 was referred to the Senate, by it referred to its Committee on Interstate Commerce, a hearing held thereon before that committee (Hearings before the Committee on Interstate Commerce of the United States Senate on bill relating to automatic couplers, continuous train brakes, etc., Government Printing Office, 1892), a report (S. R. 1049) thereon filed with the Senate and the bill then went over to the next session of Congress (C. R., V. 23, Pt. 7, p. 6483, 6552, 6957, 6958). At the second session of the Fifty-second Congress bill H. R. 9350 was considered by the Senate as a committee of the whole, amended, debated and passed by the Senate and, as amended, debated and repassed by the House and approved by the Presi-

dent, Mar. 2, 1893 (C. R., V. 24, Pt. 2, p. 1175, 1246-1252 incl., 1273-1289 incl., 1322-1335 incl., 1359-1376 incl., 1416-1426 incl., 1477-1486 incl., 1741-1743 incl., Pt. 3, p. 1953-1994 incl., 2239-2248 incl., 2262, 2290 and 2457).

In H. R. 9350, as amended by the Senate, Sec. 9 thereof as originally passed by the House became Sec. 4 and as amended read:

> "Sec. 4. That from and after the first of July, 1893, until otherwise ordered by the Interstate Commerce Commission it shall be unlawful for any railroad company to use any car in interstate commerce that is not provided with secure grabirons or handholds in the ends and sides of each car for greater security to men in coupling and uncoupling cars." (C. R., V. 24, Pt. 2, p. 1246-1252 incl.)

At the hearing on this bill before the Senate Committee, in the committee's report (S. R. 1049) and in the debate in the Senate the only mention made of the handholds provision was the following comment in debate on Feb. 10, 1893:

> "Senator McPherson: Sec. 4 provides that they shall provide grabirons or handholds at the ends and sides of each car. Nobody disputes but that this is a proper subject of legislation." (C. R., V. 24, Pt. 2, p. 1416 to 1426 incl.)

The legislative history preceding the passage of the Act of Mar. 2, 1893, conclusively shows that the purpose for which handholds or grabirons were required in the Act was to provide an appliance to grasp by the hand to remedy the evil and eliminate the risk incident to men when between cars.

It was then the intention of Congress to require such handholds only until all cars had been equipped with automatic couplers which it was assumed would obviate the necessity for men going between the ends of cars and eliminate the evils this statute was intended to remedy. With the advent of continu-

ous train air brakes and the necessity for coupling air hose and inspection of safety appliances and underrigging of cars it was still necessary for men to go between cars. Recognizing this the Commission did not "otherwise order", but as the subsequent narration of the legislative history preceding the passage of the 1910 Act will indicate, recognized the need for standardizing the location of sill steps, ladders and running boards and placing handholds at locations where they could be used and were necessary even when men were not engaged in coupling operations.

(d) *Legislative history and significant events preceding Safety Appliance Act, 1910, and Safety Appliance Standards Order confirms intent of Congress and understanding of Commission that language of handhold statute be given known and ordinary significance.*

In the Commission's annual report, 1901, attention of Congress is directed to the following quoted language, from a decision of the appellate court, 3rd district of Illinois, involving injury to a brakeman due to the absence of a handhold on an engine tender as indicative of the need for legislation requiring handholds on locomotive tenders: "From his testimony it appears that while stooping over to make a coupling, one foot by reason of the uneven condition of the ground slipped, and as there was no grabiron for him to hold to he was pitched forward and had his hand mashed." (Annual Report of Interstate Commerce Commission, 1901, p. 68, 287).

The Commission's annual report for 1902 directs the attention of Congress to the lack of uniformity in the location of ladders and roof handholds and urges legislation requiring a uniform location of these handholds. (Annual report of Interstate Commerce Commission, 1902.)

The Commission's annual report for 1903 contains a letter from its Secretary advising an official of the New York Central that if the coupling lever at the front of a locomotive is properly located and contains a 2½ inch clearance, it may be used for a handhold (Annual Report of Interstate Commerce Commission, 1903, Appendix "D", p. 339).

The Commission's annual reports for 1905, 1906, 1907 and 1908 recommend that sill steps, ladders and roof handholds be placed under statutory regulation, as was then the case with side and end handholds (Annual Reports of Interstate Commerce Commission, 1905, 1906, 1907 and 1908).

The Commission's annual report for 1909 refers to the decision of the Federal District Court for the District of Massachusetts in United States v. B. & Me. R. R. Co., holding that, if a ladder rung or brake lever is available for use as a grabiron or handhold the provisions of Sec. 4 of the Act of Mar. 2, 1893 are complied with, and makes this comment on that decision: "The decisions of the lower courts on the application of grabirons are conflicting. The Supreme Court of the United States however in the Taylor case has decided that the safety appliance law supplants the common law rule of reasonable care on the part of the employer as to providing appliances defined and specified thereon. * * * This decision must be taken as authoritative and the Commission can only conclude that when Congress specified grabirons in Sec. 4 of the law it meant grabirons and not other appliances. The Commission, therefore, cannot accept the rule of the Master Carbuilders' Association which permits certain appliances to be used as substitutes for the grabirons and will insist that grabirons be applied wherever the law requires them." In the same report in commenting on the decision of another Federal District Court it stated: "It must be inferred that when the Congress made

this requirement it meant grabirons and not uncoupling levers, step brackets, brake staffs or other appliances which were at the time used and well known." (Annual Report of Interstate Commerce Commission, 1909, p. 41, 42).

In response to the Commission's continued recommendations to standardize the location of handholds and place under statutory Federal regulation sill steps, running boards, ladders, etc., H. R. 26725 was introduced in the House, referred to its Committee on Interstate Commerce and a hearing thereon held before the committee on February 5th, 6th and 13th, 1909. The following statements made at the hearing are again illustrative of the intended use then assigned to the handholds we are now considering:

> Frank C. Hawley (International President of the Switchmen's Union of North America): "My position is that owing to the many forms under which * * * grabirons, or as they are called handholds, are placed upon cars, that the power of designating a place should be reposed in the Interstate Commerce Commission." (p. 6).
>
> H. R. Fuller (National Legislative Representative of the Brotherhood of Locomotive Engineers, Brotherhood of Locomotive Firemen and Enginemen and Brotherhood of Railway Trainmen): "This bill now before you proposes to give the Interstate Commerce Commission the authority to fix these standards and in view of our experience and the history of this legislation we believe that if we pass this bill in its present form the Master Carbuilders' Standards, some of which are objectionable to the men I represent, will be made the law * * *. The Master Carbuilders' Standards provide for grabirons under the end sill on a certain class of cars, and we think that this is dangerous. This represents the end sill (indicating to the committee) a grabiron bolted underneath that end sill; in order to give the lag screws the proper hold it has got to be set in somewhat from the edge and, consequently when a

man needs it he must put his hand under the end sill to get hold of it and we think that is wrong." (P. 24). (Transcript of hearings before the Committee on Interstate and Foreign Commerce of the House of Representatives on Safety Appliances, February 5th, 6th and 13th, 1909, Government Printing Office, 1909).

As the result of the evidence at this hearing and the recommendations of the Commission, the Act of 1910 became a law on Apr. 14, 1910. Except as above indicated, the legislative history leading up to the passage of this Act makes no mention of the use for which handholds were intended (C. R., V. 45, Pt. 1, p. 137, 159, 160, 161, 194, Pt. 2, p. 2065, 2158, 2159, Pt. 3, p. 2302, 2306, Pt. 4, p. 4216, 4217, 4242, 4243, 4256, 4257, 4377, 4378, 4446).

This Act authorized the Commission, after hearing, to fix the location, etc., of the safety appliances required by the Act of Mar. 2, 1893 (handholds or grabirons), and the Act of Apr. 14, 1910 (ladders, sill steps, running boards and handbrakes). The hearing required was held before the Commission at Washington on September 29th and 30th, 1910, and thereat the only mention made of handholds and their intended purpose was the following:

"Mr. Moseley: (Secretary of Interstate Commerce Commission), Then why did you require four handholds on each end of a high car? Mr. Belknap: (Chief Inspector of Interstate Commerce Commission), Because under air brake conditions that now confronts us, where men have to couple and uncouple through hose, we have to furnish an element of safety. Placing a handhold 30 inches above the center of a coupler does not furnish any element of safety. We provide that each car shall be equipped with a grabiron on the face, projecting downward or outward, so that he can have a convenient handhold to protect himself from injury. The other handhold on the car

is for the protection of trainmen. Mr. Moseley: In several places you make the recommendation that no allowance is made for wear on handholds. Should there not be an allowance for wear on handholds? Mr. Belknap: I don't think it is possible to wear out a handhold, a roof handhold or a grabiron. I notice they complain that there is no allowance made for wear. We say that it shall be five-eighths inch iron. I don't think it is ever possible to wear out a five-eighths inch handhold or grabiron. Mr. Moseley: Is it used for any other purpose except a handhold? Mr. Belknap: That is all." (P. 165). (Transcript of hearing before the Interstate Commerce Commission in the Matter of Proposed United States Safety Appliance Standards for the Protection of Employes and Travelers upon railroads held at Washington, D. C., Sept. 29th, 30th, 1910).

As the result of said hearing the Commission's Safety Appliance Standards Order of March 11, 1911 (Exhibit 12) was entered and now controls the location, etc., of all safety appliances required on freight cars. (Roberts F. L. C. 2nd Ed., Vol. 2, Appendix Q 2010-2038 incl.)

It will be seen that the legislative history and pertinent events preceding the 1910 Safety Appliance Acts and the Commission's Safety Appliance Standards Order confirm the intention of Congress and the understanding of the Commission that when Congress used the words "handholds" or "grabirons" it intended to designate an appliance to be grasped with the hand and that by the Safety Appliance Acts handholds were required to be secure for that purpose and not for use as a foot brace or support in releasing the brake.

(e) *Form and location of end handhold indicate intent of Congress and understanding of Commission that it be used solely as handhold.*

An examination of Exhibits 8 and 9 (R. 80, 81) indicates that the location and construction of this handhold precludes its safe use as a foot brace or support to secure leverage in releasing a hand brake. It is located 1¾ inches below the surface of the running board on which would be the left foot of a man operating the brake. It is a small rounded iron rod ⅝ inch in diameter with only 2¾ inches clearance from the west edge of the running board. Because of its location and form a man can only place a portion of the ball of his foot in a slanting position on the same. If smooth, worn or slippery it would not provide a safe support to secure any leverage in releasing a brake, and he would have difficulty in retaining his footing to prevent slipping therefrom. It would be an insecure and unsafe device if used for that purpose, while if used for its intended purpose would afford greater security to trainmen.

As the Trial Court aptly stated,

> "The very position and form of a handhold would indicate that it was not intended for that purpose. * * * Congress would not provide a thing that was dangerous in operation as a safety device, and it is quite apparent that it was more or less dangerous for any person to attempt to use it as a brace for this purpose; it might become slack and worn and insecure." (R. 75, 76.)

Congress in passing the Safety Appliance Acts and the Commission in standardizing the location, etc., of safety appliances thereunder was intent on safety. Accordingly the Commission prescribed a running board wide enough and long enough to provide the necessary and safe support for the feet of a trainman in releasing brakes. To sustain plaintiff's claim, we

would be required to assume that Congress and the Commission required handholds as an element of insecurity rather than security, which of course was just the reverse of the intention of each body.

To indicate the inconsistency of the claim that this handhold was furnished and intended to be used as a foot brace it is significant that in strict conformity with the order of the Commission respondent could have affixed this handhold extending downward, in which event it would not have been available for the use to which petitioner put it. Had respondent done so, and assuming it had been intended by Congress and the Commission as a foot brace, respondent would have been guilty of violating the handhold statute by failing to apply it extending horizontally out from the end of the running board so that petitioner could use it for that purpose. (*St. Joseph G. & I. Ry. Co. v. Moore,* 243 U. S. 311). Again, if this handhold had become smooth and slippery although secure and safe as a handhold, it would be unsafe for use as a foot brace, in which event if it was intended by Congress as a foot brace and an employe while using it as such slipped therefrom, respondent would be guilty of violating the handhold statute (*Davis v. Reynolds,* 280 Fed. 363, certiorari denied 258 U. S. 627).

Certainly it cannot be presumed that Congress by the handhold statute intended to effect this anomalous result, or that it would standardize the location of the handhold so that it could only be used as such and at the same time penalize respondent because it was not available for use as a foot brace. If there was necessity for an added appliance in connection with the release of tight brakes this necessity would exist no matter what type of car the brake was located on. We should not assume that Congress would permit an end handhold on 90% of the tank cars that could not be utilized to meet this

necessity, or specify a brake platform on a box car of a lesser width and depth than the running board on this tank car and then fail to provide an appliance for use as a foot brace or support.

When the Commission standardizes an appliance and the railroad meets the standard there is no violation of the Act because it does not furnish something other or different than that required by the Commission. *Mahutga v. M. St. P. & S. S. M. Ry. Co.*, 182 Minn. 362, 234 N. W. 474.

The Commission prescribed the standards and respondent had no discretion but to comply with them. Admittedly, this handhold was an unsafe appliance if used as a foot brace. If we assume Congress intended it for that use then respondent is placed in the anomalous position of having no discretion as to its location, form or dimensions but required to assume the risk of responding in damages to injured employes using it, even though admittedly inadequate and unsafe for that purpose. Certainly we cannot presume that this was the Congressional intent. In addition the use to which petitioner put it would, because of the pressure exerted, have a tendency to loosen and make it defective as a handhold.

We are searching for the intent of Congress and the Interstate Commerce Commission at the time of the passage of the handhold statute and the entry of the Safety Appliance Standards Order. That intent cannot be changed or modified by what a few trainmen, to meet the exigencies of a peculiar case, claim it to be now. We know that by the 1910 Act Congress desired to effect uniformity so that appliances would be located where readily available for their intended use to eliminate insecurity to trainmen. Considering briefly the testimony of petitioner's witnesses in an effort to establish that Congress required the handhold for use as a foot brace, what do we find.

They admit that the handhold was not intended as a foot brace on 90% of the tank cars and that it was intended for a foot brace on the other 10% only when a man could not release the brake with both feet on the running board. Manifestly Congress in requiring the appliance and the Interstate Commerce Commission in prescribing its location and dimensions never intended that the appliance be used as a foot brace. Otherwise it would have required an appliance for that use on all cars and the location and form thereof would have been such as to permit its use for that purpose to effect greater security to trainmen.

Only one logical conclusion can be drawn: that at the time of the passage of the handhold statute Congress intended the appliance it designated as a handhold to be used as a handhold and for no other purpose. The Safety Appliance Acts did not require respondent to maintain secure end handholds for use as foot braces.

(f) *Evil against which handhold statute directed.*

Secure end handholds were required by Congress primarily to correct the evil arising out of men being injured while between cars because they had no uniform or safe appliance to grasp for their protection when they slipped or the cars suddenly moved. This end handhold cannot be used, except by a man at the end of a car. While locations at which the Commission now requires handholds indicates an intent to also provide them for the use of employes when not between cars, there is no intent evidenced to provide them for any other use than as a handhold.

The Coupler Act (Act of Mar. 2, 1893, c. 196, Sec. 2, 27 Stat. 531, 45 U. S. C. A. Sec. 2) was designated to eliminate the risks incident to coupling, and uncoupling and the parting of cars

due to defective couplers. Couplers were not required to remedy any other evil. In the Conarty case (238 U. S. 243) he claimed the right to utilize the coupler to provide a place of safety between cars. He was denied recovery because the risk to Conarty because of insufficient space between cars was not intended to be eliminated by Congress when it required effective couplers.

Similarly, this end handhold was not required to eliminate any risk connected with the absence of a foot brace for use in releasing handbrakes, but on the contrary, was required to provide an appliance for men to grasp for their protection when on or between cars.

The risk, if there was one, due to insufficient footing in connection with the release of brakes, was removed when Congress required secure running boards. If Congress had felt that even after it had required secure running boards this risk was still present and that an additional foot brace was necessary to eliminate it, it certainly would have designated and required for that purpose an appliance safe and adequate for use as a foot brace.

VI. Petitioner Abandoned Claim of Violation of Running Board Statute and Evidence Conclusive He Made No Use of Running Board as Such When Injured.

So far as relevant, the Running Board Statute provides:

> "All cars requiring * * * secure running boards shall be equipped with such * * * running boards". (Act of Apr. 14, 1910, C. 160, Sec. 2, 36 Stat. 298, 45 U. S. C. A. Sec. 11).

In his complaint petitioner alleged a violation of the Running Board Statute and in his petition herein refers to that allegation and quotes a portion of the Act, (Petition, p. 2) but

nowhere else in his petition and brief does he argue this point and in its opinion the Circuit Court of Appeals stated that this claim of negligence was not urged in that court. (R. 110).

The sole relation the running board bore to plaintiff's injury was the fact that it split at the west edge when foot pressure was applied to the end handhold, thereby permitting one end of the handhold to pull out. It is apparent that the running board was intended as a place to stand and walk on and the statute required it to be secure for that purpose only. It was not required to be secure so that an end handhold could be affixed thereto.

> "The law, so far as it relates to running boards, deals solely with the mechanical construction and maintenance of secure running boards. This may mean that it shall be of a safe width, solidly fastened and of material to give fair footing." *Slater v. C. St. P. M. & O. Ry. Co.*, 146 Minn. 390, 178 N. W. 813.

VII. While Using End Handhold as Foot Brace, Petitioner Not One Entitled to Benefit and Protection of Handhold Statute and Violation, If Any, Under Circumstances Not Legal Proximate Cause of Injury.

The requirement for secure end handholds was not directed at any evil arising out of injuries to trainmen due to the absence of a foot brace or support to secure leverage in releasing a handbrake. The Congressional intent in requiring secure end handholds was to provide an appliance to grasp with the hands for the greater security of trainmen while between or beside the ends of cars. Therefore, while using the end handhold as a foot brace to exert pressure thereon to secure leverage in releasing the handbrake—(1) petitioner was not within the class Congress intended to benefit and protect by the requirement for secure end handholds; (2) his injury was not

within the evil against which the provision for secure end handholds was directed; (3) the giving way of the handhold was not a breach of any statutory duty respondent owed him; and (4) the violation of the Act resulting from the insecurity of the handhold when so used was not the proximate cause of his injuries.

Petitioner contends that even though he was using the handhold for a purpose for which it was not specifically required or intended by Congress and he was not one for whose especial protection and benefit the handhold statute was enacted, he may still recover as for a violation of that statute solely because he was injured in line of duty due to the end handhold giving way.

To support this contention he cites *Louisville & Nashville R. Co. v. Layton,* 243 U. S. 617, and *Davis v. Wolfe,* 263 U. S. 239, and argues that the decision of the court below is inconsistent therewith, and with the decisions of this court in *M. & St. L. R. Co. v. Gottschall,* 244 U. S. 66, and *Fairport, P. & E. R. Co. v. Meredith,* 292 U. S. 589. He recognizes that *St. L. & S. Fran. R. R. v. Conarty,* 238 U. S. 243, and *Lang v. N. Y. Cent. R. R.,* 255 U. S. 455, oppose his contention, but claims that the Wolfe decision controls because inconsistent with and later than the decisions in the Conarty and Lang cases.

Analysis will show that the lower court's decision is not inconsistent with what was actually decided in any case cited by petitioner and in principle is supported not only by the Conarty and Lang decisions, but also by those in *Chesapeake & O. Ry. Co. v. Nixon,* 271 U. S. 218, and *Chesapeake & O. Ry. Co. v. Mihas,* 280 U. S. 102. Also that this court in the Layton and Wolfe decisions did *not* go so far as to decide that the failure of a safety appliance to perform an unintended function spells liability merely because an employe suffers injury in line of duty from such failure.

Conarty Decision (238 U. S. 243).

Conarty, a switchman, was injured in line of duty while on the front footboard of a switch engine that came into collision with a box car lacking the coupler knuckle and drawbar, in violation of the Coupler Act. Had they been present sufficient space would have remained between the engine and car to have prevented his injuries. There was no intention to couple the engine to the defective car. Although Conarty was injured in line of duty because of the defective coupler, this Court denied recovery as for a violation of the Coupler Act, stating,

> "Nothing in either provision gives any warrant for saying that they are intended to provide a place of safety between colliding cars" and that Conarty "who was not endeavoring to couple or uncouple the car or to handle it in any way but was riding on the colliding engine, was not in a situation where the absence of the prescribed coupler and drawbar operated as a breach of a duty imposed for his benefit", (238 U. S. 250-251).

Petitioner argues that all this court held was that the defective coupler was not the proximate cause of Conarty's injury, while here the giving way of the handhold was the proximate cause of Swinson's injury. In the Conarty decision this court stated:

> "It is not claimed, nor could it be under the evidence, that the collision was proximately attributable to a violation of those provisions, but only that had they been complied with it would not have resulted in injury to the deceased". (238 U. S. p. 249).

Petitioner fails to distinguish between a violation of the Act due to a breach of duty owed another and the giving way of the handhold while being used for an unintended purpose as a legal proximate cause of injury.

The real basis for the Conarty decision was that the failure to provide an operative coupler to furnish a place of safety between colliding cars was not a breach of any statutory duty owed Conarty. This is shown by the fact that this court cited in support of its holding, *The Eugene F. Moran*, 212 U. S. 466, *Williams v. Chicago & Alton R. R.*, 135 Ill. 491, 24 N.E. 661, and *O'Donnell v. Providence & Worchester R. R.*, 6 R. I. 211, and other authorities, all holding that where a duty is imposed for the protection of persons in particular situations or relations a breach of it which happens to result in injury to one in an altogether different situation or relation is not, as to him, actionable.

When this Court said the collision was not proximately attributable to the violation of the Coupler Act, it meant that the failure of the coupler to perform its intended function did not cause the collision, but only that if it had been present as required by the act it would have provided sufficient space to have averted injury to Conarty. This is evident, because if, Conarty had been on the same footboard but there had been present an intention to couple the switch engine to the defective car, he could have recovered as for a violation of the coupler Act. Why? Because in such case the violation of the Act due to the failure of the coupler on the car to permit automatic coupling would have been the proximate cause of his injuries, although the absence of the coupler would still not have been the real cause of the collision. In that case the coupling apparatus would fail to perform a function intended by Congress and would result in the violation of a statutory duty imposed for Conarty's benefit.

The Layton decision (243 U. S. 617).

All this court decided was that Layton, admittedly injured as the direct result of the failure of two cars to couple auto-

matically on impact, could recover, although at the time not between the ends of these cars engaged in a coupling operation.

The ground of distinguishment between the Layton and Conarty decisions is that recovery was allowed in the Layton case because he was injured as the direct result of the couplers' failure to function when used for their intended purpose, to couple automatically on impact, while in the Conarty case he was injured because of their failure to provide space between cars brought into collision from other causes, which was not the intended purpose of couplers. The carrier breached a statutory duty to Layton when it failed to provide couplers that would couple automatically on impact, while in the Conarty case the carrier owed no statutory duty to equip the defective car with an operative coupler to provide Conarty with a place of safety between the cars.

The Gotschall decision (244 U. S. 66).

Gotschall, a brakeman in line of duty was injured due to the separation of the couplers between two cars on his train. Therein the sole question was whether the mere unexplained separation of the two couplers was proof of a violation of the coupler act. This court held it was: the purpose of the act being to require couplers that would couple automatically and remain coupled. Gotschall was injured as a direct result of the failure of the two couplers to perform this intended function.

The Lang decision (255 U. S. 455).

Lang, a brakeman, in line of duty, was injured while standing on a brake platform at the end of a box car when it collided with another car lacking the coupler knuckle and draw bar, in violation of the coupler act. Had they been intact, sufficient space would have remained between the cars to have prevented

his injury. There was no intention to couple the two cars together.

This court was urged to permit recovery on the claim that in the Layton decision it held that recovery would be allowed whenever a carrier failed to provide a coupler complying with the coupler act, and no injury would have resulted had the act been complied with. This court rejected such unwarranted construction of its language in the Layton decision, and held the Comarty decision controlling, the purpose of couplers not being to provide space between colliding cars.

Neither Lang nor any member of his crew intended to couple the car on which he was riding to the defective car; therefore they were not using, or intending to use, the coupler for the purpose for which it was intended and required by this Act. The mere fact that it was defective did not breach any statutory duty owed Lang under the circumstances. It will be noted that even after consideration of its language in the Layton decision (which petitioner claims supports his contention herein) this court, in the Lang case, held that proof of a breach of a duty was still necessary to permit recovery as for a violation of the Safety Appliance Act. Also that there is no breach of duty to an employe injured because of the failure of a safety appliance to perform an unintended function even though defective for its intended purpose.

The Wolfe decision (263 U. S. 239).

The sole question presented for decision was whether Wolfe, (admittedly injured as the direct result of a defective handhold failing to function for its intended purpose), should be denied relief as for a violation of the handhold statute solely because not at the time engaged in a coupling operation.

This court held that while one of the purposes of the handhold statute was to give greater security to men in coupling

and uncoupling cars, handholds were also required for the security of employes in other than coupling operations. Therefore merely because Wolfe was not engaged in a coupling operation did not prevent the violation of the handhold statute from being a breach of a statutory duty owed him and the proximate cause of his injuries. It is significant that Wolfe, when injured, was using the handhold as a handhold and not as a brace for his foot to exert foot pressure thereon to secure leverage in performing some other operation.

It is the following language from the Wolfe decision, which petitioner claims authorizes recovery by him as for a violation of the handhold statute, although using the end handhold as a foot brace and not for a purpose for which it was intended or required by Congress:

> "* * * he can recover if the failure to comply with the requirements of the Act is a proximate cause of the accident, resulting in injury to him while in the discharge of his duty, although not engaged in an operation in which the safety appliances are specifically designed to furnish him protection". (263 U. S. 239, 243).

This language must be considered in relation to the facts in that case. This court did not mean that an employe using an appliance for a purpose not intended or required by the Act and therefore not one for whose protection it was required to be secure, could recover merely because the appliance failed when so used and caused him injury in line of duty. An employe must be in discharge of duty to be an employe within the purview of the Federal Employers' Liability Act. When this court referred to an "operation" it only meant that to recover it was unnecessary that the employe be engaged in a coupling operation, and no more.

As indicated by the stated purpose of the handhold statute, the primary evil Congress intended to remedy by its provisions was the risk incident to men being required to be between the ends of cars to adjust the old type link and pin coupler. By the Act of 1910, Congress recognized and provided for handholds at locations having no relation to coupling operations, but it has at no time indicated any intent to require a handhold for any use but as a handhold.

That this court did not intend its language in the Wolfe decision to be given the broad construction contended for by petitioner is evidenced by the fact that it therein distinguished its previous decisions in the Conarty and Lang cases and reaffirmed and did not overrule the doctrine set forth in those cases: "* * * the requirement of automatic couplers not being intended to provide a place of safety between cars brought into collision from other causes", 263 U. S. 239, 242. The first above quoted language in the Wolfe decision is based on similar language in the Layton decision. In *C. G. W. R. Co. v. Schendel*, 267 U. S. 287, this court was careful to state that nothing it had said in the Layton decision was intended to modify or overrule anything it had said in the Conary decision.

The Nixon decision (271 U. S. 218).

Nixon, a section man in line of duty, was run down by a train because the engine crew failed to keep proper lookout ahead. The duty to keep this lookout was not for Nixon's benefit, but for that of the public at highway crossings. This Court, in effect, held that while a duty owed the public was violated and the breach of such duty injured Nixon, he could not recover because no duty owed him had been breached.

The Mihas decision (280 U. S. 102).

Mihas, a switch light tender in line of duty was injured while climbing over a coal car standing with a number of others, when they were suddenly and without warning moved by the trainmen. It was customary for trainmen before moving cars at this location to personally notify persons engaged in unloading same. Had this notice been given, presumably it would also have protected Mihas. Such notice, however, was exclusively for industry employes. Following its decision in the Nixon case and citing *O'Donnel v. Providence & W. R. R. Co.*, 6 R. I. 211, this Court held that the breach of a duty owed another, did not entitle Mihas to recover, and in effect that the carrier was not required to anticipate that the violation of the duty owed such other would cause injury to Mihas.

The Meredith case (292 U. S. 589).

Miss Meredith was struck at a highway crossing due to the failure of a train to slacken its speed or stop because the automatic air brakes were not properly connected and functioning. It was urged that she was not one entitled to the protection of the Safety Appliance Act requiring efficient automatic train air brakes because the Act's title stated it was for the protection of employes and passengers on railroad trains. This court held that the real purpose of automatic train air brakes was to enable the locomotive engineer to control the speed of and stop the train should occasion require and that a traveler at a highway crossing needed such protection as much as an employe or passenger. This court was careful to state that liability from the statutory violation only arose for an injury resulting therefrom to a person falling within the terms and intent of the act. It cited the Layton, Wolfe, Conarty and Lang cases under the assumption that all were consistent. Miss

Meredith was injured as the direct result of the failure of the air brakes to function for their intended purpose. Manifestly, if she had attempted to place her foot on the air hose in climbing between cars, and had been injured due to the disconnected air hose, she would not have been entitled to the protection of the act, although the failure to have the air hose connected would be a statutory violation. Under those circumstances she would be claiming the right to use the air brake apparatus for a purpose for which it was not intended or required by the act and the carrier owing no duty to connect the hose for that purpose would not be required to foresee injury to her because of its failure to comply with the act.

Petitioner cites *Lehigh Valley R. Co. v. Howell*, 6 Fed. (2d) 784 (C. C. A. 3); *Chesapeake & O. Ry. Co. v. Smith*, 42 Fed. (2d) 111 (C. C. A. 6); *McNaney v. C. R. I. & P. R. Co.*, 132 Minn. 391, 157 N. W. 650; *Clapper v. Dickinson*, 137 Minn. 415, 163 N. W. 752, and *Frye v. C. R. I. & P. Ry. Co.*, 157 Minn. 52, 195 N. W. 629. Although decisions of lower courts and therefore not controlling here respondent will briefly discuss them.

The *Howell case* (6 Fed. (2d) 784).

Howell, while stepping from the end ladder on a freight car to the brake platform preparatory to releasing the handbrake, placed his hand on the brake wheel to pull on it to release the brake and incidentally used it as a support to assist him in completing his climb. As he did so the ratchet rose up over the pawl causing the brake to unwind and injuring him. The brake was defective for its intended purpose. It was urged that because Howell used the brake wheel as a handhold, he was not using the brake for the purpose it was intended and

required by the handbrake Act and, therefore, could not recover. The appellate court recognized that if he used the handbrake primarily and solely as a handhold he might not be entitled to recover. It held that in fact at the time of injury he was proceeding to release the brake and had hold of the brake wheel to pull on it for that express purpose and that merely making an incidental use of it as a support in climbing to the brake platform did not show that he was not using the brake for its intended purpose nor preclude recovery as for a violation of the handbrake statute.

The *Smith case* (42 Fed. (2d) 111).

Smith, while riding in a caboose was injured because of an unexpected and abrupt reduction in speed due to defective train air brakes. The air brake act requiring automatic train air brakes to enable the locomotive engineer to "control its speed without requiring brakemen to use the common hand brake for that purpose", was relied on to support recovery. It was urged that because the defective air brakes did not require a brakeman to use the common handbrake to control the train's speed, Smith was not entitled to the protection of the Act. Recovery was allowed. His injury was the direct result of the air brakes' failure to function for their intended purpose: to control the speed of the train for the safety of employes.

The decisions in the McNaney (132 Minn. 391, 157 N. W. 650) and Clapper (137 Minn. 415, 163 N. W. 752) cases were based almost entirely on the Layton decision. What has been said herein with reference to the Layton and Wolfe decisions applies equally to the Clapper and McNaney decisions.

The Frye case (157 Minn. 52, 195 N. W. 629) involves an entirely different safety appliance act (Boiler Inspection Act) requiring every locomotive, boiler, tender and all parts and

appurtenances thereof to be in proper condition and safe to operate *in the service to which the same were put*, so that they might be employed in the actual service of the carrier without unnecessary peril to life or limb. The Minnesota supreme court held that the appliance involved was defective in the service to which the carrier had put it and Frye having been injured because of such defect, was one for whose benefit the provision of the Boiler Inspection Act, relied on, was enacted.

The claimed inconsistency between the Layton, Goftschall, Wolfe and Meredith decisions, on the one hand, and the Conarty and Lang decisions, on the other, does not exist.

Recovery was allowed in the first mentioned cases because the injuries resulted from the failure of the appliance to perform its intended function, while in the Conarty and Lang cases recovery was denied because the injuries resulted from the failure of the appliance to perform an unintended function. Stated differently, the employes in the first mentioned cases were injured as the direct result of the breach of a statutory duty owed them, while Conarty and Lang were injured as the result of a breach of statutory duty owed someone else. Therefore, Layton, Gottschall, Wolfe and Miss Meredith, when injured, were persons for whose benefit and protection the safety appliances involved were required by Congress, while neither Conarty nor Lang, when injured, was a person for whose benefit and protection Congress required operative couplers.

VIII. Result of Perversion of Congressional Intent With Respect to Safety Appliances.

A few examples will best indicate the result of adopting petitioner's contention herein.

Assume a locomotive water gauge defective in violation of the Boiler Inspection Act. An employe in line of duty uses it as a foot brace and it gives way causing him injury. Under petitioner's theory its failure would entitle him to recover as for a violation of the Boiler Inspection Act even though the injury resulted from such unintended and absurd use.

Assume that a chain is attached to a defective handhold to move a car. It fails when being so used, and causes injury to an employe in line of duty. Under petitioner's theory the injured employe may recover as for a violation of the handhold statute, although it is manifest the handhold was not required to assist in moving cars.

Assume a car in use with a missing or defective coupler in violation of the coupler act. An employe in line of duty attempts to step on it not in connection with a coupling operation and its absence or defective condition causes him injury. Under petitioner's theory he could recover as for a violation of the coupler act, although Congress never intended to provide couplers as stepping blocks.

Instances could be multiplied, but the foregoing sufficiently indicates the path along which petitioner would lead this court.

Petitioner not only was using the handhold for an unintended purpose, but was willfully misusing it. The natural tendency of such mis-use would be to make defective a handhold otherwise safe and secure for its intended purpose.

CONCLUSION.

It is too clear to require further argument that petitioner's injury resulted from the use of the end handhold for a purpose for which it was not intended or required by Congress. It follows that there is no substantial evidence of actionable negligence, because respondent owed no statutory duty to furnish petitioner with a secure end handhold, or any handhold at all, for use as a brace upon which to exert foot pressure in releasing a hand brake, and any violation of the handhold statute which may have resulted from respondent's alleged failure to furnish a secure end handhold for use as a handhold was not the legal proximate cause of petitioner's injury.

The judgment of the court below is supported in principle by the Conarty, Lang, Nixon and Mihas decisions, and by the other decisions cited under III and IV hereof, and should be affirmed.

Respectfully submitted,

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